SUPREME COURT, U. S.

FEB 6 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

Docket No. 957

LAWRENCE BURNS,
Plaintiff-Appellee,

against

THE CUNARD STEAMSHIP COMPANY, LTD.,
Defendant-Appellant and Third-Party Plaintiff-Appellant,

against

JOHN T. CLARK & SON,
Third-Party Defendant-Appellee.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHESTER A. HAHN,
Counsel for Respondent (Plaintiff-Appellee),
250 West 57 Street,
New York, N. Y. 10019

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1969

(1013)

Table of Contents.

Page

Questions Presented 1

The Underlying Cause of Action 2

The Jury's Verdict—General and Special 6

POINT I. Cunard has not established any basis for granting this petition 6

POINT II. Under proper instructions, the jury found that the hole in the area was a proximate cause of the accident and injuries 7

POINT III. Under proper instructions, the jury found Cunard failed to furnish Burns with a safe place to work in violation of its duty 11

POINT IV. Burns established Cunard's liability to him for its failure to furnish him with a reasonably safe place to work and reasonably safe passageways 12

POINT V. Liability was not imposed upon Cunard for the method Burns' employer selected to do the work or the appliances used 18

CONCLUSION 19

TABLE OF CASES.

Page

A. G. Stevedores v. Ellerman Lines, 369 U. S. 355 .... 10, 11

Bein v. City of N. Y., D. C. N. Y. 1967, 271 Fed. Sup. 542 11

Caspersen v. LaSala Brothers, Inc., 253 N. Y. 491, 171 N. E. 754 ..... 8, 14

Collins v. Noss, 258 App. Div. 101, affd. 283 N. Y. 495 9

Commissioner v. Estate of Bosch, 387 U. S. 456 7

Coughtry v. Globe Woolen Co., 56 N. Y. 124 11

Dittiger v. Isal Realty Corp., 264 App. Div. 279, rev. on other grounds 299 N. Y. 492 11

Eisenberg v. Kemp, 256 App. Div. 698, 11 N. Y. S. 2d 449 13

Employers Mutual Liability Insurance Co. v. Di-Cesare & Monaco Concrete Const. Corp., 9 A. D. 2d 379 12

Erie v. Tompkins, 304 U. S. 64 ..... 1, 19

Haefli v. Woodrich, 255 N. Y. 440, 448 13

Hess v. Bernheimer & Schwartz Brewing Co., 219 N. Y. 415, 144 N. E. 808 8

Hoggard v. Otis Elevator Co., 52 Misc. 2d 704, 276 N. Y. S. 2d 681 8

Huddleston v. Dwyer, 322 U. S. 232 7

Page

Joel v. Electrical Research Products, 94 F. 2d 588 ..... 17, 18

Joyce v. Rumsey Realty Corp., 17 N. Y. 2d 118 10

Lindgren v. Tugboat Dalzellable, Inc., 25 A. D. 2d 683, 269 N. Y. S. 2d 92 17

McGlone v. Angus, Inc., 248 N. Y. 197 7

McLean v. Studebaker Bros., 221 N. Y. 475, 117 N. E. 951 8

Ragan v. Merchant Transfer Co., 337 U. S. 530, 534 7

Rivera v. City of New York, 11 N. Y. 2d 856 9

Ryan v. Hayes (1964), 254 N. Y. S. 2d 706, aff'd 17 N. Y. 2d 760 18

Smith v. City of Corning, N. Y., 217 N. Y. S. 2d 149 17

Teitsera v. Hudson Transit, 14 N. Y. 2d 855 9

Zinsenheim v. Congregation Beth David, 10 A. D. 2d 501 11

OTHER AUTHORITIES.

F. R. C. P., Rule 49 6

Charter, City of New York, Chapter 29, §704 14

1966 A. M. C. 1275 17

Warren's Negligence, 3rd Ed., Vol. 4A 17

IN THE

Supreme Court of the United States

OCTOBER TERM 1968.

LAWRENCE BURNS,

Plaintiff-Appellee,

against

THE CUNARD STEAMSHIP COMPANY, LTD.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

against

JOHN T. CLARK & SON,

Third-Party Defendant-Appellee.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

Questions Presented.

The petition asserts that it is based upon the fact that the Court of Appeals for the 2nd Circuit and the District Court for the Southern District of New York ignored the precept of *Erie v. Tompkins,* 304 U. S. 64, and placed on this case what the petition refers to as "Federal Interpretations of the New York Law" in lieu of applying the rules of law which are applicable and which are defined by the State Courts of New York.

It is respectfully submitted that this assertion is merely a transparent stratagem to establish a basis upon which to rest the petition.

The sub-headings (a-e, inclusive) are the same points used by petitioner in the Court of Appeals. Those points were a repetition of petitioner's original argument which was rejected by the Trial Judge, who commented that:

> "Counsel for Cunard in its papers in support of the post verdict motions has re-hashed the legal arguments and issues which were resolved by rulings of the Court during trial. In addition, counsel attempts to sift the evidence with understandable focus on such strands thereof as favor Cunard, both on the issue of liability and damages" (petition, p. 33).

The Underlying Cause of Action.

The Accident.

For the sake of clarity, the respondent herein will be referred to hereafter as "Burns" and the petitioner as "Cunard." The third-party defendant-appellee will be referred to as "Clark." All references are to the appendix used in the Court of Appeals unless otherwise indicated.

On September 17, 1961, at about 2:45 P. M. (106a), Burns was a longshoreman in the employ of Clark. On that day he was engaged in helping to discharge automobiles from a vessel which was tied up at Cunard's pier (Pier 92, North River). To accomplish this he was operating a tow-wagon, a battery operated machine, approximately four feet high and about 5-1/2 feet long. This was used to tow the automobiles from the pier where they were placed by others after having been discharged from the vessel (26a).

The towing was carried out by drawing the automobile (in this case a Jaguar) on the end of a rope which was tied around the seat of the towing wagon (26a-27a).

The vehicle being towed was steered by another longshoreman, one John Dempsey (34a). The Jaguar was to be drawn from the pier and placed in a storage area designated by the City of New York, as an "open wharf" (340a and Plaintiff's Exhibits 8 and 14), which was located between the North River and the supports of the express highway and running from Pier 92, located at 52nd Street, south to 51st Street, so that it was a full block in length and approximately 25 feet in width from the bulkhead at the edge of the river to the pillars which support the highway (121a).

The area was paved with cobblestones (119a). The vehicle being towed had no gasoline; its batteries were not connected, therefore, it was without motive power (89a-90a). As Burns drew the Jaguar, its right rear wheel went into a hole (39a) bringing the towing vehicle which was being operated at about five miles an hour to a stop. Burns saw what had happened and attempted to pull the car out by feeding gas to the towing vehicle. Instead, the Jaguar did not move, but the seat on which Burns was sitting was pulled from its support by the rope which connected it to the Jaguar. He was thrown through the air, landing on the ground (40a) sustaining the injuries for which this action was brought and which will be discussed below.

The Hole Which Caused the Accident.

The hole into which the wheel of the Jaguar fell and which caused the series of events resulting in the injuries was described by Patrolman Crichton. It was 4-1/2 feet long, 2-1/2 feet wide and 5 inches deep (81a). These measurements were recorded by the officer who had responded to the call for help, in his notebook (Plaintiff's Exhibit 5), which is reproduced at pages 5 and 6 of the exhibit volume.

Photographs (Plaintiff's Exhibits 1-4) were taken sometime later and clearly show the condition described by the patrolman.

Burns identified the photographs as being a fair representation of the condition with "maybe a little piece more out here and little piece more out there" (35a).

The photographs also show the approximate location of the hole. Its relative position in the area can be seen by an examination of Plaintiff's Exhibits 1 and 4. It will be noted that Plaintiff's Exhibit 4 shows a large case in a close-up view standing over the hole and in the panoramic view, Plaintiff's Exhibit 1, the location of that case is clearly shown. See also testimony 37a-39a.

The Place Where the Accident Occurred.

The accident occurred in the working area assigned by Cunard to Burns. Cunard, by repetition of the label "street," "public street" and "city street" throughout its brief, attempts to change the character of the place where the accident occurred.

The City of New York, on the other hand, terms the place where the accident occurred an "open wharf" (Plaintiff's Exhibits 8 and 14, pp. 7-10, 28-30 of Exhibit Volume).

None of these labels changes the character of the area, its use, dominion or control. It will be pointed out below in this brief that pursuant to the provisions of the charter of the City of New York (Chap. 29, §704, subd. d), the area adjacent to the pier where this accident occurred is designated a "marginal street" and the Commissioner of Marine & Aviation is authorized to license the use of this area for the storage of goods (254a) and that acting under that authority, the Commissioner authorized the Cunard Steamship Co., to use the area to store automobiles and other cargo (334a-335a). Cunard started to occupy this

pier sometime in 1955. It used that area to store cargo that could not be accommodated on the pier (113a-114a). This is a common practice along the waterfront (114a-115a).

In order to preserve its rights and keep others from entering, Cunard's security guard caused the area to be roped off by extending a rope from pillar to pillar of the adjacent Miller Highway, all along the space for a distance of approximately a full block, which rope was then attached to a stanchion at the river's edge (120a-122a) as illustrated in Plaintiff's Exhibit 1 (p. 1, Exhibit Volume). Arrows on the photograph point to the rope.

The head of security testified:

> "There is always a rope attached along." (120a)

and:

> "The ropes are up until one of the transport trucks come to take out the cars, at which time the ropes are lowered and immediately put up again" (121a-122a).

And again:

> "The main reason for putting the ropes up is that no private cars come into the empty space which is created by cars leaving" (122a).

There were anywhere from 40 to 80 cars there at a time in addition to heavy lifts (120a). A charge of 30¢ per day per car was levied by the City of New York to Cunard and 10¢ per ton on other cargo (346a) for the use of the area.

The cars were placed in the area and a representative of the City would check the number of cars and other cargo there at least twice a day (346a-347a).

It is submitted that these facts show that this was a place of work under the dominion and control of Cunard and subject to its legal obligations which will be discussed below.

The Jury's Verdict—General and Special.

The Trial Court submitted the case to the jury with instructions to return a general verdict as well as answers to written interrogatories upon several issues, pursuant to Rule 49 F. R. C. P. (424a-425a).

The jury returned its general verdict in the sum of $105,000 in favor of the plaintiff and against the defendant (442a). With the general verdict, the jury answered the interrogatories submitted by the Court, pursuant to rule 49 (b) F. R. C. P., as follows:

> "1. Was the area or place where the accident occurred on September 17, 1961, in an unreasonably defective or unsafe condition? *Yes.*
> "2. If your answer to question #1 is 'yes,' did the defective or unsafe condition which you find to have existed on the day in question play a significant part in bringing about the injury or injuries complained of by plaintiff? *Yes.*
> "3. Was the area or place where the accident occurred on September 17, 1961, under dominion and control of defendant? *Yes.*
> "4. If your answer to question #1 is 'Yes,' do you find that defendant caused or created the unsafe or defective condition? *No.*
> "5. Was plaintiff negligent or careless on the day in question? *No.*
> "6. If your answer to question #5 is 'Yes,' did such negligence play a significant part in bringing about the injury or injuries of which plaintiff complains? *No*" (475a).

POINT I.

Cunard has not established any basis for granting this petition.

The avowed reason given as the basis for the granting of this writ when stripped of hysteria (pp. 30-31, Peti-

tion) is to give this Court an opportunity to review the interpretation of the State Law by the District Court and the Court of Appeals.

Mr. Justice Clark in *Commissioner v. Estate of Bosch*, 387 U. S. 456 (Dec. June 1967), said:

> "The issue presents solely a question of State Law and we ordinarily accept the determination of local law by the (Federal) Court of Appeals * * * and we will not disturb it here."

To the same effect, see *Ragan v. Merchant Transfer Co.*, 337 U. S. 530, 534, and *Huddleston v. Dwyer*, 322 U. S. 232, where the Court said at page 237:

> "The decision of the highest court of a State on matters of State Law are in general conclusive upon us and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of State Law by the intermediate Federal Appellate Courts."

POINT II.

Under proper instructions. the jury found that the hole in the area was a proximate cause of the accident and injuries.

Cunard's argument under Point I actually narrows down to a single claim, namely, that the defective condition which started the chain of events resulting in Burns' injuries was neither the proximate cause of the accident nor had any connection, no matter how remote. The very case with which Cunard introduces its argument to Point I (*McGlone v. Angus, Inc.*, 248 N. Y. 197) held that the question of the ability to anticipate was one for the jury. In that case, the Court of Appeals reversed a dismissal of the complaint and remanded the case for trial by jury.

The rule of proximate cause does not envision, as argued by petitioner, that Cunard should have foreseen precisely that a towed vehicle would enter the hole and that when the operator of the towing vehicle attempted to dislodge it, his seat would be torn from the towing vehicle.

> "The requirement that the injury must be one that was reasonably to be foreseen does not mean that exact occurrence or precise injury resulting from the act need be foreseen. All that is necessary is that the person charged with negligence should have been able to foresee that some injury to some person might result from his act."
>
> "* * * A wrongdoer must answer for all the consequences that may ensue in the ordinary course of events even though such consequences are immediately and directly brought about by an intervening cause if such intervening cause was set in motion by the original wrongdoer or was, in reality, only a condition on or through which the negligent act operated to produce the injurious result" (citing Authoritative Texts and Cases). *Hoggard v. Otis Elevator Co.*, 52 Misc. 2d 704, 276 N. Y. S. 2d 681.

While the citation is a lower Court decision, it is based upon and cites cases and text writers of distinction. The cases cited by Cunard are inapposite and are based either on the fact that the defect in the plant had nothing to do with the accident (*Hess v. Bernheimer & Schwartz Brewing Co.*, 219 N. Y. 415, 144 N. E. 808); that the plaintiff-servant failed to fasten a bolt causing a transom to swing and his ladder to fall (*McLean v. Studebaker Bros.*, 221 N. Y. 475, 117 N. E. 951); that the only negligence was that of an employee of a subcontractor, not the defendants (*Caspersen v. La Sala Brothers, Inc.*, 253 N. Y. 491, 171 N. E. 754); or that the negligence complained of was completely unconnected with the accident.

For example, in *Collins v. Noss,* 258 App. Div. 101, aff. 283 N. Y. 495 (petition, p. 17), a child using the headboard of a bed as a horse tipped it over, causing it to fall against a window, the fastening of which then failed, precipitating the child to a sidewalk below; and in *Rivera v. City of New York,* 11 N. Y. 2d 856 (upon which *Teitsera v. Hudson Transit,* 14 N. Y. 2d 855, was based, Petition, pp. 17-18), the negligence complained of was that a hot-water tap over a bathtub could not be shut off. The injury that was caused, however, was occasioned when a small child attempted to stand on the edge of the bathtub, slipped and fell and was then scalded by hot water which remained in the tub. Obviously, there was no connection.

Cunard overlooks the fact that the jury in this case, under proper instructions, and in answer to a specific Interrogatory (475a) found that the hole in the area was a proximate cause of the accident and injuries.

Appellant's argument addressed to the allegedly defective pusher is entirely without merit. There is no proof that the towing vehicle or pusher was defective, even with the missing ring bolt and there is no proof that this ring bolt contributed in any way to the happening of the accident. The jury, on the contrary, found in answer to interrogatory #2 that the defective or unsafe condition, that is the hole in the street, played a significant part in bringing about Burns' injuries (475a).

The Court specifically told the jury in the charge that if it found that the accident was caused by the missing ring bolt or in the manner by which the rope was secured to the pusher and that these were the only proximate causes of the accident, the verdict must be for the defendant (418a) and the Court carefully detailed the requisite facts which the jury must find to determine that the hole in the roadway was a proximate cause of the accident.

Cunard argues that the existence of the hole would not have caused the accident but that it took something else, namely some negligence in entering the hole or some negligence in the manner in which the towing vehicle was equipped to connect the hole with the accident and, therefore, Cunard argues, the defect was not a proximate cause.

The New York Court of Appeals in *Joyce v. Rumsey Realty Corp.*, 17 N. Y. 2d 118, appropriately observed:

> "No one is ever physically injured by the existtence of an unguarded opening. Something must project him into the hole but that something cannot be more than a concurrent cause of the injury."

It should be noted that the special interrogatories which were submitted to the jury, pursuant to rule 49, resulted in answers which are completely consistent with the general verdict.

In *A. G. Stevedores v. Ellerman Lines*, 369 U. S. 355, the Supreme Court said at page 364:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent they must be resolved that way. For a search for some possible view of the case which will make the jury's findings inconsistent results in a collision with the 7th Amendment. We might agree with the Court of Appeals had the question been left to us."

At pages 358-359, the Supreme Court observed:

> "But neither we nor the Court of Appeals can re-determine facts found by the jury anymore than the District Court can pre-determine them."

It is respectfully submitted that the law of the State of New York was fully, clearly and correctly presented to the jury and that under such exposition of the law, the jury properly found that the condition that existed at the place of work was a proximate cause of the accident which caused Burns' injuries.

POINT III.

Under proper instructions, the jury found Cunard failed to furnish Burns with a safe place to work in violation of its duty.

It seems strange, indeed, that Cunard seeks certiorari on the theory that the District Court and the Court of Appeals decided this case on some rule other than the law of New York State and at the same time introduces its argument in Point II with the assertion:

> "The Trial Court charged New York Law governed this situation and there can be no question that the Court was right" (Petition, p. 18).

Actually, Cunard is seeking to have this Court grant certiorari so that it may review the jury's findings of fact in the hope that this Court might arrive at a different conclusion which, it is submitted, this Court will not do as it would result in a "collision with the 7th Amendment" (*A. G. Stevedores v. Ellerman Lines, supra*).

Under New York Law, the duty to furnish a safe place to work was a common-law duty (*Coughtry v. Globe Woolen Co.*, 56 N. Y. 124).

The Labor Law of the State of New York, §200, merely codified the existing common law and did not create any new duty or responsibility (*Dittiger v. Isal Realty Corp.*, 264 App. Div. 279, rev. on other grounds 299 N. Y. 492; *Zinsenheim v. Congregation Beth David, Inc.*, 10 A. D. 2d 501; *Bein v. City of N. Y.*, D. C. N. Y. 1967, 271 Fed. Sup. 542).

The cases upon which Cunard bases its argument in Point II were decided on the question of assumption of risk or that the injury occurred solely by reason of the fact that the method of operation was improper. Here again, it is submitted, these cases are inapposite since

the jury found that the defect was a proximate cause of the accident.

In the quotation cited by Cunard (Petition, p. 21) from *Employers Mutual Liability Insurance Co. v. DiCesare & Monaco Concrete Const. Corp.*, 9 A. D. 2d 379, the Court observed that:

> "The injured employee was not the victim of any hidden traps *or unguarded openings.*" (Italics ours.)

Burns *was* a victim of an unguarded opening. If he had driven the towing vehicle into the unguarded opening and thus sustained injury, the result may have been different, but this would have been based upon a possible finding of contributory negligence, not on the fact that the defendant was not required to maintain the place of work in a safe condition.

The injury was sustained when the towed vehicle being operated by a person other than Burns entered the unguarded opening. This act at most might be considered a concurrent cause, but under all of the circumstances, with the confined working space and the necessity for placing the car in a particular way, it cannot be said that the person guiding the towed vehicle should have avoided the opening. Even if he *might* have avoided the opening this would in no way affect Burns' right to recover.

POINT IV.

Burns established Cunard's liability to him for its failure to furnish him with a reasonably safe place to work and reasonably safe passageways.

> "The duty to furnish a safe place to work was a common law duty * * * (it) runs to all persons employed on the premises without regard to whether they are employees of the party in control or in possession.

> "An occupant of land owes to the servants of an independent contractor, employed to do work thereon, the duty of exercising ordinary care to render the premises reasonably safe for the performance of the work." *Haefli v. Woodrich*, 255 N. Y. 440, 448.

The foregoing represents an authoritative statement of the law of the State of New York and represents the theory upon which this case was submitted to the jury.

It matters not whether the defendant is the owner of the premises or the lessee or merely an occupant. As long as he is the *occupant* or has *assumed control* over the premises, the duty exists as stated in the *Haefli* case, *supra*.

In *Eisenberg v. Kemp*, 256 App. Div. 698, 11 N. Y. S. 2d 449, a case where an invitee was injured in a portion of the premises not occupied or controlled by the defendant, the Court nevertheless found liability and said:

> "Defendant Kemp having assumed control over the hallway for the purpose of waxing the floor, was in a position analogous to an owner of premises who reserves control of the halls to which it invites persons to come, and * * * was * * * under a duty to exercise reasonable care to keep the floor of the lobby in a reasonably safe condition for access and egress to persons lawfully on the premises * * *."

As mentioned in the statement of facts and as will be more fully developed below, the place where the accident occurred was actually a place of work, but whether it was such or merely a way or approach to a place of work does not alter defendant's duty.

> "We think the owner of the building, acting as general contractor, was under a duty to the plaintiff to use reasonable care in maintaining the *approaches* to the elevator in a condition of reasonable safety and is answerable in damages if the

> duty was ignored. Liability is not defeated by the fact that the plaintiff was a servant of the subcontractor and not a servant of the owner. He had come into the building in furtherance of the owner's business and was using ways and approaches necessary or suitable to enable him to go forward with his work. In such circumstances the duty and protection is independent of the relation of servant and employer." *Caspersen v. LaSala Bros.*, 253 N. Y. 491, 171 N. E. 774. (Italics ours.)

Defendant's duty embraced the place where the accident occurred.

The area where plaintiff worked—the point to which he was towing the Jaguar and the place where the Jaguar entered the hole, were all a part of the place of work.

Actually, this area was occupied and used by the defendant under a grant of authority by the owner of the property, the City of New York, which acted under the charter of the City of New York.

Chapter 29, §704, subdivision (d) provides:

> "The Commissioner (of Marine & Aviation) shall have the exclusive power to regulate the use of marginal streets so that they may be used to the best advantage in connection with wharf property and to regulate by license or otherwise the transfer of goods and merchandise upon, over or under all such marginal streets except as may be provided by law" (254a).

Those areas thus used were designated as "open wharfage areas" and the particular area in question was included (340a).

This defendant used and occupied the area to the same extent as though it had an exclusive lease. A repre-

sentative of the Dept. of Marine & Aviation testified that this area was considered an open wharfage area (340a) and had been used and occupied by the defendant in that way for a period of at least six years prior to the happening of the accident (113a-114a); the use being "to store the overflow of cargo that cannot be accommodated on the pier proper" (114a). It paid the city for this privilege, the rental being fixed by the volume of cargo stored there daily (115a).

The extent and continuity with which the defendant exercised control is evidenced by the testimony of Matthew Cronin, Security Officer of Cunard Steamship Co., who testified:

> "As you passed by daily, did you observe whether or not any cargo was stored in the roadway which I think is known as 12th Avenue, which is immediately east of the easterly boundary line of th[redacted] pier? A. [redacted]s, sir. I would say roughly we almost always have cars there.
>
> * * *
>
> "Q. Do you know whether or not that area was ever roped off? A. * * * The man that's assigned there, well, he is in at least one hour before the longshoreman arrive to work the ship. In order to avoid the longshoremen coming in and taking up the space, if there's no cars there, which is not too often, we extend the rope from pillar to pillar all along to keep that space reserved for whether it may be 40, 50, 60, 70, 80 cars, we need the whole area. There is always a rope attached along. * * *
>
> "Q. To clear up the question before this: The rope that you referred to is stretched along pillars which are in the roadway east of the east end of the pier and run south of the pier itself, is that correct? A. That is correct. * * *
>
> "Q. So that it extends a full block? A. The full block. * * *
>
> "Q. How great is the distance as best you can estimate it from the pier to the pillars where these

ropes are put up? A. I would say approximately 25 feet.

"Q. Are these ropes up all the time? A. No the ropes are up until one of the transport trucks comes or someone comes for a delivery. Then they take them down to push the cars out. They are supposed to be put up again. Sometimes a second transport truck is there to take more cars but then they put them up again.

"Q. So that as soon as the cars are removed the ropes are replaced? A. The main reason for puting the ropes is that no private cars coming into the empty space which is created by cars leaving" (120a-122a).

A Case in Point.

In a strikingly similar case where the facts were almost identical to the case at bar, a seaman was injured while traversing the dock leading from the ship to the street. The Trial Court had dismissed his complaint. The Appellate Division (N. Y.) reversed and said:

> "In our opinion the evidence offered by the plaintiff was sufficient to establish *prima facie* a common law cause of action in negligence. An employer has a common law duty to use ordinary care to furnish his employees with a reasonably safe place to work. This duty, long recognized by the admiralty courts is not restricted to the exact *situs* of the labor but extends to the exercise of reasonable care to see that the means of ingress and egress and ways customarily used by the employee in passing from one part of the premises to another in the course of his employment are reasonably safe (*Atlantic Transport Co. of W. Va., v. Imbrovek,* 234 U. S. 52; *Maher v. Atlantic Stevedoring Co.,* 199 App. Div. 630, 192 N. Y. S. 255, * * *). This *duty extends even to areas over which the employer has no control* (*Matter of Ross v. Howieson,* 232 N. Y. 604, 134 N. E. 589).

> "Here the evidence offered by plaintiff was sufficient to raise a question of fact regarding the safety of various means of ingress and egress connecting the dock with the public thoroughfare. This question should have been submitted to the jury." (Italics ours.) *Lindgren v. Tugboat Dalzellable, Inc.*, 25 A. D. 2d 683, 269 N. Y. S. 2d 92 and 1966 A.M.C. 1275.

Liability Arising From Special Use of the Thoroughfare.

Even if we accept the label which Cunard seeks to append to the area where the accident occurred, namely that of a "street," it would nevertheless be liable as it enjoyed a special use.

Where an adjoining owner or lessee has the benefit of a special use of adjacent public thoroughfares, such abutting occupant may be liable alone or jointly with the municipality upon whom the primary responsibility for repair usually falls (*Smith v. City of Corning*, N. Y., 217 N. Y. S. 2d 149; *Joel v. Electrical Research Products*, 94 F. 2d 588).

The liability for a defect in a public highway which arises against one having a special benefit is well stated in Warren's Negligence, 3rd Ed., Vol. 4A, pages 340-343:

> "Such special use of the sidewalk and the driveway is analogous to the use of part of the sidewalk by an abutter for a grate to serve his convenience and for the benefit of his property. That part so put to a special use, under permit and so of right is so subject to his control that the law places upon him the obligation to maintain it in a suitably safe condition for the public to use it as a part of the sidewalk. Moreover, it cannot matter that the special use of part of a public sidewalk takes the form of a driveway for vehicles rather than a grate or covering for a hole. *The law imposes the duty because of the special use of the sidewalk*

and not more for one particular kind of special use than another." (Italics ours.)

See also *Ryan v. Hayes* (1964), 254 N. Y. S. 2d 706, aff'd 17 N. Y. 2d 760; *Joel v. Electrical Research Products, supra.*

POINT V.

Liability was not imposed upon Cunard for the method Burns' employer selected to do the work or the appliances used.

It is respectfully submitted that Point IV of the petition raises a question of fact which was passed upon by the jury adversely to Cunard and, certainly, should not be a basis for certiorari.

The point raises the argument that Cunard was not responsible for any defective equipment or improper method employed. The jury was carefully charged:

> "Another illustration of this argument by defendant would be that this tow rope was improperly fastened to the tow motor and that * * * there was a missing ring bolt on the back of this tow motor and that, * * * it was this negligence, and exclusively this negligence, and exclusively this negligence, insofar as playing a part in Mr. Burns' accident.
>
> "Now, of course it is true that if you found that there was an unsafe condition which was the responsibility of the steamship company, but you also found that this unsafe condition played no significant part whatsoever in causing the injury, then you would be obliged to find for the defendant" (418a).

Cunard was apparently well satisfied with this portion of the charge and took no exception as the charge, indeed, did properly set forth the rules of law as they apply in this case.

CONCLUSION.

Petitioner has failed to establish any reason for granting certiorari in this case. Its assertions that the Courts have ignored the precepts of *Erie v. Tompkins* are unsupported and the claims of error are non-existent.

Respectfully submitted,

CHESTER A. HAHN,
Counsel for Respondent.